United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 30, 2004

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Northwest Industrial Contractors
Case 36-CA-9446-1

Integrity Plus Plumbing
Case 36-CA-9353-1

590-7575-2500
590-7587

The Region submitted these two Section 8(a)(5) and (1) cases for advice as to whether language in the recognition clauses of certain "me-too" agreements, on its own, converted the Union's bargaining relationship with two separate employers from a Section 8(f) relationship to a Section 9(a) relationship.

We conclude that the language in the recognition clauses did not create Section 9(a) relationships because they did not satisfy the three-part test set forth in Central Illinois Construction.[1] Accordingly, the Region should, absent withdrawal, dismiss both Section 8(a)(5) and (1) charges filed by the Union.

FACTS

These cases involve the nature of the separate bargaining relationships between Plumbers Local 290 (the Union) and two employers, Northwest Industrial Contractors (NIC) and Integrity Plus Plumbing (Integrity), in the Portland, Oregon area. In 2000, NIC signed a Compliance Agreement that bound it to the terms of the 1997-2003 Master Labor Agreement between the Union and the Plumbing and Piping Industry Council, a multi-employer association. The recognition clause in the agreement stated:

> [t]he Employer agrees to recognize and does hereby recognize the Union as the exclusive collective bargaining representative for all workers performing work for the Employer throughout the term of this Compliance Agreement on all present and future jobs within the Union's geographic

[1] 335 NLRB 717, 719-720 (2001).

> jurisdiction. The Employer represents that prior to signing this Compliance Agreement, he has determined by objective factors, that a majority of the employees that will be covered by this Compliance Agreement have authorized the Union to represent them for purposes of collective bargaining.

At the time of execution, the Union did not provide, or offer to provide, NIC with any evidence that it represented a majority of NIC's employees.

In 2001, NIC, again, and Integrity separately signed identical Compliance Agreements that bound each of them to the terms of the 1997-2003 Master Labor Agreement. The recognition clause in those agreements stated:

> [t]he Union claims and the Employer acknowledges and agrees that a majority of its employees have authorized the Union to represent them in collective bargaining as their exclusive bargaining representative. The Employer hereby recognizes the Union as the exclusive bargaining representative, under section 9(a) of the National Labor Relations Act, for all its employees performing work on all present and future jobs within the Union's craft and geographic jurisdiction as described in the Master Labor Agreement.

At the time of execution, the Union did not provide, or offer to provide, NIC or Integrity with any evidence that it represented a majority of the employees in the relevant bargaining unit.

All of the Compliance Agreements allowed either signatory party to terminate them by providing written notice to the other party between 150 and 180 days before the Master Labor Agreement expired on March 31, 2003. On separate dates in October 2002, both NIC and Integrity provided timely written notice to the Union that they were each terminating the Compliance Agreements they had signed.

After the Master Labor Agreement expired, the Union requested that NIC and Integrity continue recognizing and bargaining with the Union. The Union also requested that NIC adhere to the terms of the newly negotiated 2003-2009 Master Labor Agreement. The Union asserted that NIC and Integrity remained obligated to recognize and bargain with it because the recognition clauses of the Compliance Agreements had converted the Union's bargaining relationship

with each employer from a Section 8(f) relationship to a Section 9(a) relationship.

In the alternative, the Union asserted that its bargaining relationship with NIC and Integrity converted to a Section 9(a) relationship after execution of the agreements because all of the workers it had dispatched to NIC and Integrity were Union members.

NIC and Integrity each asserted that it had not created a Section 9(a) relationship with the Union and therefore it did not have to recognize and bargain with the Union after the 1997-2003 Master Labor Agreement expired, or adhere to the terms of the 2003-2009 Master Labor Agreement. Relying on Nova Plumbing, Inc. v. NLRB,[2] NIC and Integrity each asserted that its Section 8(f) relationship with the Union did not convert to a Section 9(a) relationship because the Union did not show, or offer to show, evidence of its majority support when each of the Compliance Agreements were executed.

The Union subsequently filed Section 8(a)(5) and (1) charges alleging, among other things, that NIC and Integrity had unlawfully refused to recognize and bargain with the Union.

ACTION

We conclude that the Compliance Agreements did not convert the Union's Section 8(f) relationship with either NIC or Integrity into a Section 9(a) relationship because the language in the recognition clauses did not satisfy the three-part test set forth in Central Illinois Construction. Accordingly, the Region should dismiss both Section 8(a)(5) and (1) charges, absent withdrawal.

There is a significant difference between a union's representative status under Section 8(f) and under Section 9(a) of the Act. Under Section 8(f), a collective-bargaining agreement does not bar representation petitions and an employer may terminate the bargaining relationship upon expiration of the agreement.[3] Under Section 9(a), a collective-bargaining agreement bars representation petitions and an employer must continue to recognize and

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[2] 330 F.3d 531, 536-538 (D.C. Cir. 2003), denying enf. of 336 NLRB 633 (2001).

[3] See, e.g., Central Illinois Construction, 335 NLRB at 718.

bargain with the union after the agreement expires, unless and until the union is shown to have lost majority support.[4]

In the construction industry, a party may rely upon appropriate contract language alone to establish a Section 9(a) relationship.[5] In Central Illinois Construction,[6] the Board held that an employer or union in the construction industry asserting a Section 9(a) relationship based on contract language must satisfy the three-part test established by the Tenth Circuit in NLRB v. Triple C Maintenance, Inc.[7] and NLRB v. Oklahoma Installation Co.[8] The three-part test requires language that unequivocally indicates (1) the union requested recognition as the majority or 9(a) representative of the unit employees, (2) the employer recognized the union as the majority or 9(a) bargaining representative, and (3) the employer's recognition was based on the union having shown, or having offered to show, evidence of its majority support.[9] The Board also stated that it would "continue to consider relevant extrinsic evidence" in cases where the contractual language was not "independently dispositive."[10]

Based on these principles, we conclude that the recognition clauses in the 2000 and 2001 Compliance Agreements did not convert either NIC's or Integrity's bargaining relationship with the Union from Section 8(f) status to Section 9(a) status.

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[4] Id.

[5] Id. at 717. But see Nova Plumbing, Inc. v. NLRB, 330 F.3d at 536-538 (contract language alone did not establish a Section 9(a) relationship where evidence showed unit employees resisted union representation).

[6] 335 NLRB at 719-720.

[7] 219 F.3d 1147, 1155 (10th Cir. 2000), enforcing 327 NLRB 42 (1998).

[8] 219 F.3d 1160, 1164 (10th Cir. 2000), denying enf. of 325 NLRB 741 (1998).

[9] See Central Illinois Construction, 335 NLRB at 719-720.

[10] Id. at 720, fn. 15.

A. The Recognition Clause in the 2000 Compliance Agreement did not Satisfy the First Element of the Central Illinois test.

The clause in the 2000 agreement that NIC signed is deficient because it fails to satisfy the first prong of the Central Illinois test, i.e., unequivocally indicating that the Union requested recognition as the unit employees' Section 9(a) representative. The clause merely states that NIC would "recognize the Union as the [employees'] exclusive collective bargaining representative." In NLRB v. Oklahoma Installation Co., the court held that contractual language alone will not create a Section 9(a) relationship where the language merely "state[s] that an employer 'recognizes' a union as an exclusive collective bargaining agent without other language showing that the recognition is based on [Section] 9(a)."[11] Although specific reference to Section 9(a) is not necessary to satisfy this element of the Central Illinois test,[12] the recognition clause must contain some language that unambiguously demonstrates the parties' intent to create a 9(a) relationship. Here, the contractual language temporally limits recognition to "the term of this Compliance Agreement." This language supports NIC's claim that the parties intended a Section 8(f) relationship, because an 8(f) relationship is terminable at the end of a contract.[13] If the parties' relationship was governed by Section 9(a), the Union's status as exclusive bargaining representative would continue even after contract expiration.[14] Because it did not satisfy the first element of the Central Illinois test, the language of the 2000 Compliance Agreement failed to create a Section 9(a) relationship between NIC and the Union.

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[11] 219 F.3d at 1164.

[12] See, e.g., NLRB v. Oklahoma Installation Co., 219 F.3d at 1165; NLRB v. Triple C Maintenance, Inc., 219 F.3d at 1155-56; Nova Plumbing, Inc., 336 NLRB 633, 635 (2001), enf. denied 330 F.3d 531 (D.C. Cir. 2003).

[13] Cf., e.g., Sheet Metal Workers Local 19 v. Herre Bros., Inc., 201 F.3d 231, 242 (3d Cir. 1999) (finding contractual language established 9(a) relationship even absent specific reference to Section 9(a) where language stated recognition would continue "unless and until such time as the [u]nion loses its status as the employees exclusive representative as a result of an NLRB election. . . .")

[14] See Central Illinois Construction, 335 NLRB at 718, and the cases cited.

B. The Recognition Clause in the 2001 Compliance Agreements did not Satisfy the Third Element of the Central Illinois test.

With respect to the recognition clause in the 2001 Compliance Agreements that NIC and Integrity entered into, it is clear that, unlike the language in the 2000 agreement, it satisfies the first two elements of the Central Illinois test. The statement that the "Employer . . . recognizes the Union as the exclusive bargaining representative, under Section 9(a)" establishes both that the Union requested recognition as the 9(a) representative and that NIC and Integrity recognized it as such.[15]

This recognition clause does not, however, satisfy the third element of the test. The clause fails to unequivocally state that the Union showed, or offered to show, evidence of its majority support. Rather, the Union merely "claims" in the clause that it enjoys majority support. This language is similar to that found deficient in NLRB v. Oklahoma Installation Co., one of the cases upon which the Central Illinois test is based. In Oklahoma Installation, the recognition clause stated the union "submitted" that it enjoyed majority support. The court found the language did not satisfy the third element because it was ambiguous and could have been interpreted as a mere assertion that the union made to the employer.[16] Because the use of the word "claims" here creates the same ambiguity, it fails to unequivocally indicate that the Union showed, or offered to show, evidence of its majority support to either NIC or Integrity.

Moreover, the clause remains deficient even though it states that NIC and Integrity each "acknowledges" that the Union enjoyed majority support among the relevant unit employees. In NLRB v. Oklahoma Installation Co., the court found the recognition clause failed to show that the union had shown, or had offered to show, evidence of its majority support even though the clause stated that the employer was "satisfied" that the Union represented a majority of the unit employees.[17] Thus, as in Oklahoma Installation, the

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[15] See, e.g., NLRB v. Triple C Maintenance, Inc., 219 F.3d at 1155-56.

[16] See NLRB v. Oklahoma Installation Co., 219 F.3d at 1165-66.

[17] 219 F.3d at 1162, 1165-66. See also NLRB v. Triple C Maintenance Co., 219 F.3d at 1155 (stating that to satisfy requirement that language demonstrate union proved, or offered to prove, it enjoyed majority support, recognition

contract language here is not sufficient to create a Section 9(a) relationship between the Union and either of these employers.[18]

Because the contractual language is ambiguous and is not independently dispositive of whether a Section 9(a) relationship was created, consideration of relevant extrinsic evidence is appropriate here. For example, in Pontiac Ceiling & Partition Co., the Board found that a 9(a) relationship was created even though the recognition clause merely stated that the incumbent union "claim[ed]" majority support.[19] The evidence in that case showed that at contract execution, the incumbent union presented signed authorization cards from a majority of the employees, even though the multi-employer association's bargaining representatives did not review the cards.[20] Unlike Pontiac Ceiling, there is no extrinsic evidence here that the Union presented, or offered to present, NIC or Integrity with evidence of its majority support. In fact, the Union admits that it did not offer proof of majority support to either employer. Absent extrinsic evidence to clarify the ambiguous language of the recognition clause here, the Union has failed to demonstrate that its relationship with NIC or Integrity converted to 9(a) status.[21] Thus, by providing

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clause must "have the employer acknowledge the fact that majority status was shown") (emphasis added).

[18] See generally CAB Associates, 340 NLRB No. 171, slip op. at 7, fn. 5 & 6 (December 31, 2003), where counsel for the General Counsel argued, and the ALJ found, that a recognition clause almost identical to the clause in the 2001 Compliance Agreements did not satisfy the Central Illinois test because, among other things, it failed to "state that recognition was based on the [u]nion's having shown, or having offered to show, evidence of majority support."

[19] 337 NLRB 120, 121 (2001).

[20] Id. at 121, 123. See also Babylon's Painting & Decorating, Inc., Cases 37-CA-6385-1, et al. (Advice Memorandum dated July 22, 2003) (finding 9(a) relationship where union "claim[ed]" majority support in recognition clause, and extrinsic evidence showed union demanded 9(a) recognition in negotiations, explained that it wanted 9(a) status to prevent loss of jurisdiction to a rival union, and obtained authorization cards from majority of employees).

[21] The Union's reliance on the membership of the employees it dispatched to NIC and Integrity to establish its majority support is misplaced. As the Region notes, the Board does

timely notice of termination of the Compliance Agreements, NIC and Integrity satisfied their obligations under Section 8(f) and they were not legally required to recognize and bargain with the Union after the 1997-2003 Master Labor Agreement expired on March 31, 2003, or adhere to the terms of the new 2003-2009 Master Labor Agreement.[22]

In sum, we conclude that the language in the Compliance Agreements did not convert either NIC's or Integrity's bargaining relationship with the Union to a Section 9(a) relationship. As a result, neither NIC nor Integrity were obligated to recognize and bargain with the Union or adhere to the terms of the new Master Labor Agreement. The Region should dismiss both charges, absent withdrawal.

B.J.K.

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not rely on union membership in determining whether a majority of employees support the union as their bargaining representative. See generally John Deklewa & Sons, 282 NLRB 1375, 1383-84 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[22] The Region found that the termination notices that NIC and Integrity timely served on the Union in October 2002 revoked any assignment of bargaining rights to the multi-employer association that entered the 2003-2009 Master Labor Agreement. See James Luterbach Construction Co., 315 NLRB 976, 979-980 (1994) (finding Section 8(f) employer not bound to multi-employer association bargaining unless "by a distinct affirmative action, [the employer] recommitted to the union that it will be bound by the upcoming" negotiations).